



Citation: *JJ v Canada Employment Insurance Commission*, 2023 SST 1926

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant: J. J.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (590195) dated June 5, 2023 (issued by Service Canada)

Tribunal member: Greg Skelly

Type of hearing: Teleconference

Hearing date: August 31, 2023

Hearing participants: Appellant

Decision date: September 8, 2023

File number: GE-23-1736

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Appellant.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant lost his job because of misconduct (in other words, because he did something that caused him to lose his job). This means that the Appellant is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Appellant lost his job as an assembly worker at X. The Appellant's employer said that he was let go because he threatened to smash the phone of another employee after being warned 3 weeks earlier that if he threatened staff or physically damaged property, he would be terminated.²

[4] The Appellant says that the decision to fire him was based off false accusations and that his employer did not complete a proper investigation. The Appellant says that he did not do the things he was accused of.³

[5] The Commission accepted the employer's reason for the dismissal. It decided that the Appellant lost his job because of misconduct. Because of this, the Commission decided that the Appellant is disqualified from receiving EI benefits.

Matter I have to consider first

The Appellant asked me to move the hearing forward.

[1] The Appellant asked me to move the hearing forward from the scheduled date of August 31, 2023, to the week of August 14 to 18, 2023. He made this request on August 14, 2023.

¹ Section 30 of the *Employment Insurance Act* says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

² See GD3-41.

³ See GD2-4

[2] I declined to move the hearing forward as my schedule was full for this week and I did not feel that it was sufficient notice for the Commission.

[3] The Appellant was notified that the hearing would proceed by teleconference on August 31, 2023.

Issue

[6] Did the Appellant lose his job because of misconduct?

Analysis

[7] To answer the question of whether the Appellant lost his job because of misconduct, I have to decide two things. First, I have to determine why the Appellant lost his job. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Appellant lose his job?

[8] I find that the Appellant lost his job because he breached his employer's policies on vandalism, bullying and violence in the workplace.

[9] The Appellant and the Commission don't agree on why the Appellant lost his job. The Commission says that the reason the employer gave is the real reason for the dismissal. The employer told the Commission that there were several incidents in the workplace that led to the Appellant's dismissal.⁴

[10] The employer told the Commission that on January 6, 2023, the Appellant threw another employee's radio on the floor.⁵ And that a meeting was held with the Appellant and the other employee where the Appellant admitted kicking the radio and apologised.⁶

⁴ See GD3-31.

⁵ See GD3-27.

⁶ See GD3-31.

[11] The Commission says that the Appellant agreed in the meeting not to touch or damage property again or he may be terminated.⁷

[12] The meeting from the incident of January 6, 2023, was documented and sent to the Appellant and stated that the company will not tolerate any workplace bullying or damage of property and that the Appellant could be dismissed.⁸

[13] The employer told the Commission that on January 25, 2023, the Appellant threatened to throw a wrench at another employee.⁹ And that on January 26, 2023, the Appellant threatened to smash his supervisor's cellular phone.¹⁰

[14] The Commission says that the employer provided the Appellant with a termination letter referencing the January 6, 2023 incident and the January 26, 2023 incident.¹¹

[15] The Appellant disagrees. The Appellant says that the real reason he lost his job is that there were false allegations made against him.

[16] The Appellant says that when he had a meeting about the January 6, 2023 incident he stated that he unplugged the radio causing it to fall off a paint barrel and that later in the day, the radio was working.¹²

[17] At the hearing the Appellant said that he unplugged the radio because he did not like listening to it and that it is against the law to have a radio on the shop floor. He said he did not kick it or throw it but just unplugged it and it fell on the floor as it was on an uneven surface.

⁷ See GD3-31.

⁸ See GD3-37.

⁹ See GD3-29 and GD3-31.

¹⁰ See GD3-28 and GD3-31.

¹¹ See GD3-41.

¹² See GD8-3

[18] In testimony, the Appellant says he had a meeting with his manager and Human Resources and was not given a warning about future behaviour. He also says the difference in the warning letter¹³ where it says he threw the radio and the termination letter¹⁴ where it says he kicked the radio on the floor proves he was wrongfully dismissed.

[19] At the hearing, the Appellant took strong issue with the fact that the warning letter from the January 26, 2023 incident is dated January 6, 2023.¹⁵ And he says that he never got any warning letters.

[20] I find that the Appellant was terminated for threatening to break his supervisor's cell phone after having a previous warning for similar behaviour.

[21] I find the evidence that the employer provided to the Commission credible. They provided written warnings and explanations to the Appellant and it is clear that the employees of his workplace were uncomfortable with his presence.

[22] The evidence that the employer provided to the Commission is convincing and given the amount and type of documents provided, I am placing more weight on their information.

[23] While the Appellant said in testimony that he didn't receive a warning from the January 6 incident, I have been presented with no evidence as to why the employer would make a false allegation against the Appellant.

[24] The minor fact of whether the radio was kicked or thrown on the floor from the January 6, 2023 incident, does not change the fact that the actions of the Appellant caused the radio in question to end up on the floor.

[25] I am similarly unconcerned with a minor typographical error in the employer dating a letter January 6, 2023, rather than January 26, 2023.

¹³ See GD3-27.

¹⁴ See GD3-41.

¹⁵ See GD3-28.

[26] The Courts have told us that clerical or minor errors such as this which do not cause prejudice is not fatal to a decision under appeal.¹⁶

[27] In his Request for Reconsideration with the Commission, the Appellants says that he was terminated due to misconduct.¹⁷ And while he may not agree with the reasoning behind the termination, the fact remains that is why he was fired.

Is the reason for the Appellant's dismissal misconduct under the law?

[28] The reason for the Appellant's dismissal is misconduct under the law.

[29] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.¹⁸ Misconduct also includes conduct that is so reckless that it is almost wilful.¹⁹ The Appellant doesn't have to have wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.²⁰

[30] There is misconduct if the Appellant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being let go because of that.²¹

[31] The Commission has to prove that the Appellant lost his job because of misconduct. The Commission has to prove this on a balance of probabilities. This means that it has to show that it is more likely than not that the Appellant lost his job because of misconduct.²²

¹⁶ See *Desrosiers v Canada (Attorney General)*, A-128-89.

¹⁷ See GD3-39.

¹⁸ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁹ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

²⁰ See *Attorney General of Canada v Secours*, A-352-94.

²¹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²² See *Minister of Employment and Immigration v Bartone*, A-369-88.

[32] I have to focus on what the Appellant did or didn't do, and whether that conduct amounts to misconduct under the EI Act.²³ I can't consider whether the employer's policy is reasonable, or whether his termination was a reasonable penalty.²⁴

[33] I can only decide whether there was misconduct under the EI Act.

[34] I can't make my decision based on other laws.²⁵ I can't decide whether an appellant was constructively or wrongfully dismissed under employment law.

[35] And I can't deal with other matters unrelated to this claim such as a previous overpayment decision or subsequent denial from another employer.

[36] The Commission says that there was misconduct because the Appellant was warned that he could be dismissed and that he was terminated after a final incident of violence.²⁶

[37] The Commission says that that there was a causal relationship between the Appellant's conduct and his dismissal.²⁷

[38] The Appellant says that there was no misconduct because he was not provided with any warnings.²⁸ And that the allegations against him regarding the January 26, 2023 incident was false.²⁹

²³ See sections 30 and 31 of the EI Act.

²⁴ See *Paradis v Canada (Attorney General)*, 2016 FCA 1282; *Canada (Attorney General) v McNamara* 2007 FCA 107.

²⁵ See *Canada (Attorney General) v McNamara*, 2007 FCA 107. In limited circumstances, the Tribunal can decide cases based on the *Canadian Charter of Rights and Freedoms*. Those circumstances are when an appellant is challenging the EI Act or regulations made under it, when an appellant is challenging the *Department of Employment and Social Development Act* or regulations made under it, and when an appellant is challenging certain actions taken by government decision-makers under those laws. In this appeal, the Appellant isn't doing that.

²⁶ See GD3-4.

²⁷ See GD4-3.

²⁸ See GD3-65.

²⁹ See GD2-3, GD3-12, GD3-39, GD3-41 (Appellant written comments on termination letter), GD3-65, GD3-67, GD3-78, GD8-3, GD9-3 and GD9-4.

[39] The Appellant says that the January 6, 2023 incident did not occur as described by the employer as the radio was on a paint barrel and he could not have kicked it off because the barrel too high.³⁰

[40] The Appellant confirms that he unplugged the radio and that when he did so, the radio fell off the paint barrel on the floor.³¹

[41] The warning letter that the employer provided to the Commission says that the Appellant threw the radio on the floor.³² And the summary document provided to the Commission by the employer says that the Appellant initially denied throwing the radio on the floor and then later admitted that he kicked the radio.³³

[42] The warning letter that the Appellant received says that future similar behaviour could lead to termination.

[43] The Commission relied on documents and discussions with the employer regarding the January 26, 2023 incident where it was alleged that the Appellant threatened to damage the cellular phone of another employee.³⁴

[44] I find that the Commission has proven that there was misconduct, because after being warned for similar behaviour, the Appellant threatened to damage the property of another employee.

[45] It is clear to me that the Appellant had damaged another employee's property on January 6, 2023, and that a meeting occurred in which he was told that similar behaviour could lead to his termination. This meeting was followed up with a warning letter.

³⁰ See GD4-4.

³¹ See GD2-5.

³² See GD3-27.

³³ See GD3-31

³⁴ See GD3-24, GD3-25, GD3-26, GD3-28 and GD3-31

[46] I find the Commission's evidence to be credible. It is credible that the issue was raised with the Appellant. The evidence of the warning letters is compelling that the Appellant knew or ought to have known that his actions could lead to his termination.

[47] While the Appellant denied at the hearing that he got any warning letters, I believe that the letters were crafted and that he received them. He confirmed that the letters were addressed correctly, and the Appellant could give no reasonable explanation about why the employer would write the letter and not send it to him.

[48] The employer's statements to the Commission are consistent with the documentation of the warning letters.

[49] Given that his address is unchanged from his employment to when he filed his appeal, it is credible that he would have received the written warning from the January 6, 2023 incident and therefore he ought to have known that similar behaviour could lead to his termination.

[50] The Appellant was aware of his employer's Human Resources Policy and Procedure Manual as he produced part of it as part of the Request for Reconsideration.³⁵

[51] The Appellant is less credible as he could present no evidence why the company would make false allegations regarding his conduct. He said in testimony that he had no idea why they would want to ruin his life but that they discriminated against him and didn't like him. He provided no evidence to prove his claims.

[52] Based on the balance of probabilities, I find that the Appellant had a discussion with his employer and received the warning letter. And that he threatened to damage the property of another staff member on January 26, 2023, leading to his termination.

[53] I do not accept the Appellant's arguments that the employer made false allegations against him.

³⁵ See GD3-44 and GD3-45.

So, did the Appellant lose his job because of misconduct?

[54] Based on my findings above, I find that the Appellant lost his job because of misconduct.

Conclusion

[55] The Commission has proven that the Appellant lost his job because of misconduct. Because of this, the Appellant is disqualified from receiving EI benefits.

[56] This means that the appeal is dismissed.

Greg Skelly

Member, General Division – Employment Insurance Section